United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1351

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

-against-

ISAIAH CRUTCH and ANNA JEAN GEORGE,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellants' Brief

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TABLE OF CONTENTS

CASES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

-against-

ISAIAH CRUTCH, a/k/a Alexander Jackson, and
ANNA JEAN GEORGE, a/k/a Alice Holmes,

Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS ISAIAH CRUTCH and ANNA JEAN GEORGE

The Appellants, ISAIAH CRUTCH and ANNA JEAN GEORGE, appeal from an order and judgment, rendered in the United States District Court for the Southern District of New York (Pollack, J.) denying their motion to suppress evidence and controvert a search warrant, and convicting them of Conspiracy under Title 18 United States Code, Section 371 of violating Title 18, United States Code Sections 1341 and 1342; and violation of Title 18, United States Code, Sections 1341 and 1342 as charged in Counts Two, Three, Four, Five, Six, Seven, Eight and Nine of the Indictment.

Proceedings were begun when the Appellants were indicted in

the Southern District of New York. The Indictment alleged nine counts.

The first count charged the Appellants with conspiracy to violate Title 18, USC, Sections 1341 and 1342 in that from on or about January 1, 1973 till the filing of the Indictment, the Appellants and others, conspired to defraud and obtain money using false and assumed names by sending certain mail matter by the Postal Service; by counts two, three, four and five, the Appellants were charged with violation of Title 18 USC, Sections 1341 and 1342 in that in furtherance of their scheme to defraud, they did cause certain mail matter to be sent and delivered by the Postal Service on April 24, 1974, May 3, 1974, March 1, 1974 and April 4, 1974, respectively; by counts six, seven, eight and nine, the Appellants were charged with violation of Title 18 USC, Section 1341 and 1342 in that in furtherance of their scheme to defraud, they used false and assumed names and took from the Postal Service mail matter addressed to such assumed names.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Was the affidavit in support of the search warrant for the Appellant George's apartment partially based on illegally seized evidence?

B. Was the affidavit in support of the search warrant for the Appellant George's apartment partially based on deliberate misrepresentations?

C. Was the search warrant for the Appellant George's apartment issued without a showing of probable cause?

D. Should the Appellants' convictions be reversed by reason of the introduction of the items into evidence which were seized at the Appellant George's apartment?

E. Were the Appellants denied a fair trial by reason of the improper comments by the Government Attorney during summation?

FACTS

A: SUPPRESSION HEARING

On August 29, 1974, between 8:30 & 9:00 in the morning, three federal officers executed an arrest warrant for the person of Anna Jean George,* for mail fraud, at premises 66-36 Yellowstone Boulevard, Queens, New York, Apartment 6E (26-27, 47-48, 61-62).**

Upon arriving at the door to the apartment in which the appellant was known to live, one officer knocked on the door, which was then opened by the appellant George. She was placed under arrest and the officers entered the apartment. The Appellant George, awakened by the knock dressed only in a nightgown, was asked to get dressed. (27-28, 41, 48, 61-62).

Prior to allowing the Appellant George into the bathroom and bedroom, Agent Dale Hackbart and Postal Inspector Wayne Meyers searched the two (2) rooms. It was apparent the Appellant George had no weapon on her person and furthermore, Postal Inspector Christine Macho, who advised Appellant of her rights was with her at all times. (28, 36, 48-49, 50, 63, 64, 67)

While at the apartment, Officers Hackbart and Meyers made a ten (10) minute search of the bathroom, bedroom, bedroom walkin closet, living room, linen closet, kitchen, broom closet and wall closets in the foyer by the door, they did not look in drawers or cabinets. (29, 33, 38, 42, 49-51, 55) Both officers testified their search was to make sure no one else was in the rooms. (28, 42, 50-51) They did not know who lived in the apartment other than the Appellant George and found men's clothing in the living room after searching the bedroom and bathroom. (41, 49)

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*Hereinafter referred to as Appellant George.

**Numbers refer to Pages of Appendix.

At the time of execution, the officers had a Grand Jury subpoena for Isaih Crutch*. The officers knew that both appellants had been identified by a clerk at Macy's as two (2) people who passed a forged and fraudulent check. (41, 45, 59) No one else was found in the apartment. (33)

The Appellant George was permitted to call her attorney after she dressed and her attorney arrived at the apartment sometime thereafter. (37, 40, 56, 64)

While at the apartment, Agent Hackbart found a blank check and checkwriting machine in the walkin closet in the bedroom and Inspector Meyers found a Sunoco credit card, in the name of Nobles, lying on the TV set in the living room. (29, 30, 31, 39, 43, 52, 56, 57)

Sometime after finding these items, Agent Hackbart called the United States Attorneys Office for the Eastern District and received verbal authorization to "Secure the place and we will give you a search warrant". (37) The officers and Appellant George, who was dressed within 20 minutes after their arrival, waited for approximately 1-2 hours before taken from the apartment. (34, 51-52, 64-67). The officers testified they were securing the apartment while waiting for other agents to arrive. (34, 67-68) Agent Hackbart testified his weapon was never drawn while at the apartment. (35)

B: TRIAL

On August 20, 21, 22, 1975, trial of this matter was held before the Honorable Milton Pollack, in the United States District Court for the Southern District of New York. There were fifteen (15) Government witnesses called to testify and numerous Government Exhibits, including items taken from the apartment of the Appellant George, introduced into evidence during the course of the trial. The Appellants rested at the close of the Government's case. (73, 91, 138-140)

*Hereinafter referred to as Appellant Crutch.

The testimony adduced at trial tended to establish that the Appellants George and Crutch from on or about January 1, 1973 till the filing of the Indictment, conspired between themselves and others, to violate Sections 1341 and 1342 of Title 18, US Code, in that they devised a scheme to defraud merchants, credit card companies and banks by obtaining charge accounts and credit cards under false pretenses, and with the use of the US Postal System.

That each Appellant, aiding and abeting the other and in furtherance of this scheme to defraud, caused certain mail matter to be sent and delivered by the Postal Service, such mail matter being addressed by fictitious and assumed names at the request of the Appellants.

At the conclusion of the trial, each Appellant was found guilty of Counts One through Nine as charged in the Indictment.

POINT ONE

THE SEARCH WARRANT FOR THE APPELLANT GEORGE'S APARTMENT SHOULD BE CONTROVERTED BY REASON OF THE FACT THAT THE AFFIDAVIT IN SUPPORT THEREOF WAS BASED ON ILLEGALLY SEIZED EVIDENCE

Case law holds that a search conducted incidental to a lawful arrest is valid if confined to the prisoner's body and to the area within his immediate grasp. *Chimel v. California*, 395 US 752. Under the Supreme Court's holding in *Chimel* an officer is permitted to search for and seize any weapon which the prisoner might use to escape or any evidence which he might readily destroy. Furthermore, in the absence of well recognized exceptions, there is no justification for a routine search of any room other than that in which the arrest occurs, or any other closed or concealed areas in said room.

It is the Appellants' contention that the search and seizure herein, conducted incidental to the arrest of the Appellant

George, was not a recognized exception as contemplated by *Chimel.* See *Sibron v. N.Y.*, 392 US 40, wherein search not motivated by nor limited to the objective of protection, was held invalid.

The Appellants readily concede that Government Officers have a right to make a limited search for their own protection as incidental to a lawful arrest, however, said search should be given careful scrutiny by this Court when the arrest it is based upon was made at the time, place and manner of the officer's choosing. This caveat was noted by the Court in *Chimel,* wherein it stated that law enforcement officials could engage in searches not jusitifed by probable cause by the simple expedient of arranging to arrest suspects at home rather than elsewhere.

As stated in *McDonald v. United States,* 335 U.S. 451 and cited by the Court in *Chimel,*

> ". . . the presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . before they violate the privacy of the home". *Chimel,* Supra pg. 761

An arrest warrant should not be used as a subterfuge for conducting an otherwise illegal search. As the record indicates, the Appellant George was arrested at the door of the apartment, when she responded to the officer's knock. (27-28, 48) Clearly under *Chimel,* the officers would have had no authority to search any part of the apartment at this point, except for the area adjacent to the door and within the Appellant's immediate grasp. But the officers chose to execute the warrant between 8:30 and 9:00 in the morning when it could reasonably be expected to find the Appellant asleep. The Appellant, apparently awakened by the officers and dressed only in a nightgown, was instructed to get dressed and the officers thereby gained entry into the apartment. (26, 28, 47, 48) The officers thereupon conducted their ten (10) minute "cursory search". (28-29, 49, 51)

Although the Court concluded in the case at bar that the search was reasonable based upon "security considerations", this was not borne out by the facts adduced at the Hearing. Therein, Agent Hackbart testified he was not even listening for noises which may have indicated the presence of another individual, nor was his weapon ever drawn during his ten (10) minute search through the four (4) room apartment. (35, 38, 39) It is submitted, if these officers were indeed searching the apartment for "security considerations", they were fortunate that no one else was found. (33) On the other, if their purpose was to seek evidence, their "limited search" proved most beneficial by reason of the fact that the items seized were allegedly in open view and served as the basis for the issuance of the Search Warrant herein.

Further doubt is cast on the objective and extent of the search herein, in light of the subsequent Trial testimony of Agent Hackbart. Surely, if these officers had any reasonable cause to believe that they were in danger, their initial search of the apartment should have eased their minds. Yet, during the course of the Trial, when the constitutionality of the search was not at issue, Hackbart testified that a search of the apartment was made after the Appellant was dressed. (88-90) Besides raising serious question as to whether an initial search was ever made, it negates any inference that the officers reasonably believed they were in danger.

With respect to the extent of the search conducted, the testimony of the officers indicated that it was only a cursory search resulting in the seizure of a check, a checkwriter and a credit card, which were all in plain view. Agent Hackbart at the hearing specifically stated that at the time he opened the closet he did not see any checks in the name of John Shaffner. (43) If this testimony is to be given credibility then how can it be reconciled with his subsequent testimony at Trial wherein he indicated that after finding the check in open view he placed a call to an individual named John Shaffner. (76-77) It is sub-

mitted, the only logical answer to the above is that the extent of the initial search went far beyond the limits as originally testified to.

It is respectfully submitted, that under the facts of this case, wherein the time, place and manner of the arrest was within the officers' complete discretion and where there is indication that testimony was tailored to conform to required Constitutional standards, the items seized herein should be suppressed and the Search Warrant controverted.

POINT TWO

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS PARTIALLY BASED ON FALSE AND DELIBERATE MISREPRESENTATIONS TO THE ISSUING MAGISTRATE

Case law has held that where the affidavit contains either deliberate misrepresentations or material misrepresentations that reduce the proof below probable cause the warrant should be declared invalid. *United States v. Gonzalez*, 488 F2nd 837 (2nd Cir. 1973); See also *United States v. Upshaw*, 448 F2nd 1218 (5th Cir. 1971).

In the case at bar, Agent Hackbart testified that following the arrest of the Appellant George, he made application for a search warrant for the Appellant's apartment.

In his affidavit in support of said warrant, Agent Hackbart stated that the premises was known to be occupied by Anna Jean Williams (maiden name of the Appellant George) and Isiah Crutch. (2) In contrast to this, he testified at the Suppression Hearing that he did not know who lived in the apartment other than the Appellant George. (41)

Again in his affidavit, Hackbart alleged that after observing mens clothing lying in the living room, they searched the hall closet to see if Crutch was hiding in the apartment and there

observed in plain view a commercial check writing machine, a quantity of blank checks bearing the name of John Schaffer and an address on East 53rd Street, in New York City. (3) However, at the Suppression Hearing, he testified that he only saw one check which had fallen to the floor. (43) Furthermore, with respect to the address on East 53rd Street, attention is drawn to item No. 32 of the inventory sheet signed by Agent Hackbart, indicating the address was written on a white envelope which was not alleged to have been observed at that time. (10) It is interesting to note that the quantity of blank checks in the name of Schnaffer total only five (5) in number, two of which were in an envelope and that they were inventoried as Nos. 19, 32, 47 and 48, which infers they were not recovered together. (8, 10, 13)

Finally, Hackbart affirmed in his affidavit that a positive identification was made on the Appellants as the individuals who passed a phony certified check to R H Macy Co. (3) Yet at the Suppression Hearing, Postal Inspector Wayne Meyers, who accompanied Hackbart and was in possession of the photographic spread on the day the identification was made, testified that the identification was made by only one woman and that it was not positive. (44, 59) as to appellant George

It is respectfully submitted, by reason of the deliberate misrepresentations placed in the affidavit by the officer affiant, the Search Warrant herein should be controverted.

POINT THREE

THE FACTS SET FORTH IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT ARE INSUFFICIENT TO SHOW PROBABLE CAUSE

The appellants reassert the arguments as set forth in Points I & II and incorporate them into the argument in Point III.

As mandated by the Fourth Amendment to the United States Constitution

". . . No Warrants shall issue but upon probable cause supported by Oath or affirmation".

Based upon the affidavit of Agent Dale Hackbart, a search warrant was issued for premises 66-36 Yellowstone Boulevard, Queens, New York, apartment 6E, to search for "evidence of a scheme to defraud through the use of the United States mail . . . and the crime of possession of goods stolen from a Federally insured bank". (1)

As stated in *Briniger v. United States*, 338 US 106, probable cause is based upon the practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. Applying this test, it is respectfully submitted that a reading of the affidavit in support of said warrant is barren as to any factual allegations to justify its issuance.

As a reading of the affidavit clearly indicates, there is absolutely no factual showing made that either of the Appellants were in any way connected with the theft or possession of goods stolen from a Federally insured bank. The mere allegation of observing a quantity of blank checks in the name of John Schaffner, has absolutely no bearing or weight with respect to the above. The same is true with respect to the allegations that the appellants were identified as two persons who passed a phony certified check to RH Macy Co. and that a commercial check writing machine was observed in the apartment. At most, the two allegations establish that the appellants may have committed a crime against RH Macy Co. and that the apartment contained a machine that was otherwise legal to possess.

With respect to a showing of probable cause that evidence can be found in the apartment of a scheme to defraud through the use of the United States mail in violation of Title 18 USC, Section 1341, the affidavit alleged that the crime for which Anna Jean Williams was arrested for involved the submission of phony credit card applications to credit card companies through the mails and that a Sunoco Oil Credit Card in the name of James Nobels was found in open view in the living room of the apartment known to be occupied by Williams.

Surely the mere fact that the appellant was arrested for a credit card fraud does not establish probable cause to search her residence and same is not supplied by the finding of a credit card in her residence in the name of another individual, without any factual showing that the card was not legitimately in her possession. It must be noted Inspector Meyers testified that although he knew the card was in a name other than the appellant's name, he did not know whether or not it was legitimate. (56, 57) Furthermore, there was absolutely no connection shown between the other items found in the apartment and the credit card fraud as would supply the necessary probable cause that is otherwise lacking.

It is submitted, the facts alleged in the affidavit are insufficient to establish probable cause and therefore the search warrant should be controverted and the evidence seized suppressed. *Spinelli v. U.S.*, 393 US 410.

POINT FOUR

THE JUDGMENTS OF CONVICTION AS AGAINST BOTH APPELLANTS SHOULD BE REVERSED BY REASON OF THE INTRODUCTION OF THE ITEMS INTO EVIDENCE WHICH WERE SEIZED AT THE APPELLANT GEORGE'S APARTMENT

In the interest of brevity, the Appellants reassert the arguments as set forth in Points I, II and III of this brief and incorporate them into the argument in Point IV.

The Government, during the course of its direct case, called fifteen (15) witnesses and introduced into evidence one hundred and forty-six (146) exhibits. (138-140) Ten (10) of these exhibits were items that had been recovered from the Appellant's apartment pursuant to the Search Warrant. (78, 79, 80, 81, 82, 83, 84, 85, 86, 87).

Prior to retiring for deliberation, the Jury was instructed by

the Court to make written request for any evidence they may desire. Approximately forty (40) minutes later, the Jury requested eighteen (18) items of evidence, ten (10) of which were the items seized from the apartment under the Search Warrant. One hour and fifteen minutes later the Jury returned guilty verdicts against both Appellants. (132-137)

Should this Honorable Tribunal agree with the Appellant's contentions as set forth in either Point I, Point II or Point III of this brief, and suppress the evidence seized at the Appellant George's apartment, it is respectfully submitted that the judgments of conviction as to both Appellants should be reversed due to the fact that the Jury should never have been permitted to have considered such unlawfully seized evidence.

POINT FIVE

THE APPELLANTS WERE DENIED A FAIR TRIAL DUE TO THE IMPROPER COMMENTS OF THE GOVERNMENT ATTORNEY DURING SUMMATION

During the closing argument of the Assistant United States Attorney, the following transpired in the presence of the Jury.

MS. STRAUSS: .....

Ladies and gentlemen, this case does not show an individual one-time action on the part of either defendant. It shows a course of conduct by each of them and by both of them acting together. What was the motive here? You ask yourselves. It was plain-out greed.

Who are the victims? In the first instance it is the credit card companies. In the first instance, it is the department stores. But we all know that in the end it is passed down to everybody else.

MR. EISENBERG: Objection, your Honor.

THE COURT: Overruled.

MS. STRAUSS: And law-abiding citizens, like each of you, who work hard for your money, are forced to pay the price for this kind of fraud and dishonesty.

MR. LAIFER: Judge, I move to strike all of that.

MR. EISENBERG: Objection.

MR. LAIFER: As being inflammatory, irrelevant, having nothing to do with the facts or the law of this case.

THE COURT: Motion denied. This is argument. That is her opinion.

MS. STRAUSS: Law-abiding citizens like yourselves are forced to pay the price for the fraud and dishonesty of these defendants". (92-93)

As indicated above, the prosecutor persistently and repeatedly told the jurors that they individually shared the pecuniary losses of the department stores, whose credit cards were allegedly misused by the defendants. The prejudice inherent in such conduct is to ask the jurors to consider themselves as complainants in the trial, and as such, to constitute themselves as unsworn witnesses.

It is inconsistent with due process to permit the prosecution during the trial to imply that actual economic loss was suffered by each juror, and to further imply that if these "law-abiding citizens" were to acquit these defendants, they would run rampant and do further financial damage.

Surely, the prosecution in a robbery case could not alarm the jury by stating that if the accused were acquitted, he would rob again and again, and his next victim could possibly be a juror or a member of his family. Logically, such prejudicial conduct by the prosecutor is no less prejudicial where the charges are different. *United States v. Schwartz*, 325 F.2d 355; *United States v. Burgros*, 304 F.2nd 177.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED, FOR THE REASONS HEREINBEFORE STATED, THE SEARCH WARRANT SHOULD BE CONTROVERTED, ALL EVIDENCE SEIZED AT THE APPELLANT GEORGE'S APARTMENT SHOULD BE SUPPRESSED, AND THE JUDGMENTS OF CONVICTION AS AGAINST EACH APPELLANT SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Dated: Brooklyn, New York
November 24, 1975

Respectfully submitted,

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Appellant, Isaiah Crutch

STEPHEN R. LAIFER
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Appellant Anna Jean George

EDWIN IRA SCHULMAN
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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Nov 197_ deponent served the within Brief upon: U.S. Atty. So. Dist. of NY

attorney(s) for Apellee

in this action, at U.S. Courthouse Foley Sq. NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 24 day of Nov. 1975.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976